

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GERDA ZINNER, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 3:23-cv-00535
)	
STATE OF TENNESSEE, ET AL.)	Judge Aleta A. Trauger
)	
Defendants.)	

**STATE DEFENDANTS' RESPONSE TO PLAINTIFFS'
NOTICE OF SUPPLEMENTAL AUTHORITY**

State Defendants respectfully submit this Response to Plaintiffs' Notice of Filing of Supplemental Authority, E.D. 113, regarding *Kadel v. Fohwell*, No. 22-1721, 2024 WL 1846802 (4th Cir. Apr. 29, 2024). Plaintiffs point to this non-binding authority to support equal-protection arguments that were all considered, and squarely rejected, by the Sixth Circuit in *L.W. ex rel. Williams v. Skremetti*, 83 F.4th 460 (2023).

First, the Fourth Circuit's finding of sex discrimination was based on its flawed reasoning that performing a procedure to treat a physical problem is the "same medically necessary treatment" when performed to treat the purely psychological condition of gender dysphoria. *Kadel*, 2024 WL 1846802, at *1, 16. As *Kadel* tells it, performing a vaginoplasty on a female to treat a congenital defect is no different than removing the healthy genitals of a gender dysphoric male and creating a neovagina in their place. *Id.* at *16. The Sixth Circuit has rejected that exact argument. *L.W.*, 83 F.4th at 481-82 (finding that sex-transition procedures are "unique to each sex" and that regulation of the same does not trigger heightened scrutiny).

Second, the Sixth Circuit has rejected *Kadel's* reasoning that a law or policy "referencing sex" necessarily triggers heightened review, 2024 WL 1846802, at *17. *See L.W.*, 83 F.4th at 482 (collecting

laws regulating medical procedures defined by sex, including abortion, female genital mutilation, prostate cancer, cervical cancer, and others). To be sure, the Exclusion at issue here is sex-neutral because it applies equally to both sexes and “does not prefer one sex over the other.” See *L.W.*, 73 F.4th at 480; *see also* E.D. 106 at 1-4 (rebutting Plaintiffs’ argument).

Third, the Sixth Circuit has rejected *Kadel’s* reasoning that a law or policy regulating sex-transition procedures unlawfully “stems from gender stereotypes,” 2024 WL 1846802, at *17. *See L.W.*, 83 F.4th at 485-86 (“[r]ecognizing and respecting biological sex differences does not amount to stereotyping”).

Fourth, the Fourth Circuit’s assertion that restrictions placed on sex-transition procedures constitute a “proxy” for discrimination based on transgender status, *Kadel*, 2024 WL 1846802, at 14, is the same argument unsuccessfully raised by the *L.W.* dissent—and which the majority declined to adopt. *See L.W.*, 83 F.4th at 501 (White, J., dissenting); *see also* E.D. 106 at 4 (rebutting Plaintiffs’ argument). Moreover, Plaintiffs here, like the *Kadel* majority, neglect to engage in the legal analysis required to establish intentional discrimination by proxy. *See Kadel*, 2024 WL 1846802 at 40 (Richardson, J., dissenting) (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (explaining that discrimination by proxy may be presumed only if a classification is “unexplainable on grounds other than” a protected trait)); *see also* E.D. 101 at 25-26.

Finally, *Kadel* proceeded under the assumption that “transgender people constitute a quasi-suspect class” that triggers heightened scrutiny. 2024 WL 1846802 at *9. The Sixth Circuit has held they do not. *L.W.*, 83 F.4th at 486-87 (“rational basis review applies”); *see also* E.D. 93 at 5-8 and E.D. 106 at 4-5 (rebutting Plaintiffs’ argument).

This Court should follow the Sixth Circuit's binding analysis set forth in *L.W.* and grant State Defendants' Joint Motion to Dismiss Plaintiffs' First Amended Complaint.

Respectfully submitted,

/s/ Steven Griffin

Steven J. Griffin (Bar No. 40708)

Senior Counsel for Strategic Litigation

Ryan N. Henry (Bar No. 40028)

Reed N. Smith (Bar No. 40059)

Assistant Attorneys General

Office of the Tennessee Attorney General

P.O. Box 20207

Nashville, TN 37202-0207

Phone: 615-741-9598

steven.griffin@ag.tn.gov

ryan.henry@ag.tn.gov

reed.smith@ag.tn.gov

Counsel for State Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2024, the undersigned filed foregoing document using the Court's Electronic Court-Filing system, which sent notice of filing to the following counsel of record:

COUNSEL OF RECORD	PARTY REPRESENTED
<p>Ezra Cukor Z. Gabriel Arkles Shayna Medley Transgender Legal Defense and Education Fund, Inc. 520 8th Ave, Ste. 2204 New York, NY 10018 Telephone: (646) 862-9396 Facsimile: (646) 993-1686 ecukor@transgenderlegal.org garkles@transgenderlegal.org smedley@transgenderlegal.org</p> <p>J. Scott Hickman (No. 17407) Sherrard Roe Voigt & Harbison, PLC 150 3rd Ave. South, Suite 1100 Nashville, TN 37201 Telephone: (615) 742-4200 Facsimile: (615) 742-4539 shickan@srvhlaw.com</p> <p>Phillip F. Cramer (No. 20697) Sperling and Slater, LLC 150 3rd Ave. South, Suite 1100 Nashville, TN 37201 Telephone: (615) 742-4535 pcramer@sperling-law.com</p> <p>Darren Teshima Udit Sood Covington & Burling, LLP Salesforce Tower 415 Mission Street, Suite 5400 San Francisco, California 94105-2533 Telephone: (415) 591-6000 Facsimile: (415) 591-6091 DTeshima@cov.com USood@cov.com</p>	<p>Counsel for Plaintiffs</p>

<p>Suzan F. Charlton Natalie Ritchie Elaine H. Nguyen Covington & Burling, LLP One CityCenter 850 Tenth Street, NW Washington, D.C. 20001-4956 Telephone: (202) 662-6000 Facsimile: (202) 778-5465 scharlton@cov.com nritchie@cov.com enguyen@cov.com</p> <p>James A. Holloway Covington & Burling, LLP 1999 Avenue of the Stars, Suite 3500 Los Angeles, CA 90067-4643 Telephone: (424) 332-4800 Facsimile: (424) 332-4749 jholloway@cov.com</p>	
<p>David M. Sanders (Bar No. 016885) Jessica Jernigan-Johnson (Bar No. 032192) Knox County, Tennessee 400 W. Main St., Suite 612 City-County Building Knoxville, Tennessee 37902 Telephone: 865-215-3236 Facsimile: 865-215-2936 David.Sanders@knoxcounty.org Jessica.Johnson@knoxcounty.org</p>	<p>Counsel for Defendant Knox County Board of Education</p>
<p>Kimberly S. Veirs S. Jae Lim Ejaz H. Baluch, Jr. Jennifer M. Swedish United States Attorney's Office 719 Church Street, Suite 3300 Nashville, TN 37203 Telephone: (615) 736-5151 Kimberly.Veirs@usdoj.gov Jae.Lim@usdoj.gov Ejaz.Baluch@usdoj.gov Jennifer.Swedish@usdoj.gov</p>	<p>Counsel for Interested Party United States of America</p>

Respectfully submitted,

/s/ Ryan Henry

RYAN N. HENRY